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MM Docket No 00-69
RM-9850
RM-9945
RM-9946

OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION

¹ This opposition is timely filed in response to public notice of Fort Bend's Petition for Partial Reconsideration given via publication in the Federal Register on July 14, 2003. See 47 C.F.R. § 1.429(f).

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Reconsideration, and seeks to substitute a counterproposal in a rule making that has long since been concluded. Lake Michigan hereby opposes Fort Bend yet again, and incorporates by reference the information provided in its earlier pleadings in this proceeding. In particular, Lake Michigan reiterates that the modification of Lake Michigan's station WKLA(FM) to specify a different operating channel is contrary to the public interest for the numerous reasons stated in its earlier opposition. Accordingly, as discussed below, the Commission should dismiss Fort Bend's latest Petition for Reconsideration as repetitious and improper, and affirm its *MO&O*.

BACKGROUND

Lake Michigan is the licensee of radio station WKLA(FM), Ludington, Michigan, operating on Channel 292A. In the course of the above-referenced rule making proceeding, Lake Michigan responded to an Order to Show Cause issued by the Commission. Lake Michigan demonstrated that the modification of WKLA(FM)'s established operating channel sought by Fort Bend was not in the public interest.² By its *Initial Order* released May 17, 2002, the Commission concluded its lengthy rule making and modified its FM Table of Allotments to allot Channel 249C3 at Cheboygan, Michigan, as a second service, and Channel 292C2 at Onaway, Michigan, as a first local service. In doing so, the Commission denied Fort Bend's counterproposal submitted in the rule making as defective. *Initial Order* at ¶ 9, 13. Fort Bend's counterproposal entailed a number of interrelated changes to the FM Table of Allotments, including the proposed change to WKLA(FM)'s operating channel.

² See In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Cheboygan, Rogers City, Bear Lake, Bellaire, Rapid River, Manistique, Ludington, Walhalla and Onaway, Michigan), Order to Show Cause, MM Docket No. 00-69, DA 01-1184, released May 11, 2001; Lake Michigan Broadcasting Response to Order to Show Cause, MM Docket No. 00-69, filed July 2, 2001.

Subsequently, on July 3, 2002, Fort Bend petitioned for reconsideration of the Commission's decision in the *Initial Order*, arguing that the Commission had erred in concluding that a portion of its convoluted counterproposal was technically deficient. Lake Michigan filed an opposition to Fort Bend's initial Petition for Reconsideration, arguing that Fort Bend had submitted no new facts or circumstances justifying a reversal of the Commission's *Initial Order*. In addition, two other parties, Northern Radio Network Corporation and Northern Radio of Michigan, Inc., opposed Fort Bend's Petition for Reconsideration on technical grounds.

On April 30, 2003, the Commission released its *MO&O* in the instant matter affirming its earlier decision and denying Fort Bend's Petition for Reconsideration. The Commission affirmed its rejection of Fort Bend's counterproposal, stating "Fort Bend has failed to demonstrate that there is an available site at which a tower could be constructed which would enable a Channel 260C1 allotment to comply with Section 73.315(a) of the Rules and gain FAA approval." *MO&O* at ¶ 8. Thereafter, on June 26, 2003, Fort Bend once again filed for reconsideration. This time, rather than arguing that the Commission had erred in its decision, Fort Bend's Petition for Partial Reconsideration simply takes the opportunity to offer yet another counterproposal to a rule making that has long since been concluded.

DISCUSSION

First and foremost, Fort Bend's Petition is simply a reconsideration of its earlier reconsideration and must be dismissed. Section 1.429(i) of the Commission's Rules states, "[a]ny order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstance, a second petition for reconsideration may be dismissed by the staff as repetitious." 47 C.F.R. § 1.429(i). In the instant situation, the

Commission's *MO&O* did not modify the rules adopted in the *Initial Order* (i.e., the change to the FM Table of Allotments) and thus, Fort Bend's Petition does not seek reconsideration of a modification that justifies a second petition. As such, consistent with Section 1.429(i), the Commission should dismiss Fort Bend's petition as repetitious.³

Moreover, Fort Bend's Petition fails to present any valid basis for reconsideration of the Commission's earlier actions. It is well-settled law that a petition for reconsideration is defective unless it demonstrates changed facts or circumstances, or facts that were unknown to the petitioner until after the petitioner's last opportunity to present them to the Commission.⁴ In this case, Fort Bend has not presented any changed facts that have occurred since its last opportunity to submit information prior to the release of the *MO&O*. Indeed, the sole purpose of Fort Bend's Petition is to request that the Commission enact Fort Bend's new counterproposal on its own motion and without the benefit of a separate rule making proceeding and related public comment.

Beyond simply failing to present a sufficient legal or factual basis for a reversal of the Commission's *Initial Order*, Fort Bend's Petition is merely an untimely and improper attempt to submit a counterproposal to its earlier counterproposal in this rule making, well after the

³ See also Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 14 FCC Rcd 11572 (MMB 1999); Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Lincoln, Osage Beach, Steelville and Warsaw, Missouri), 12 FCC Rcd 4987 (Policy and Rules Div. 1997) (dismissing second petition for reconsideration in FM rule making proceeding stating, "[I]nasmuch as the MO&O affirmed the R&O's dismissal of petitioner's counterproposal for lack of verification and did not modify this result in any way, further reconsideration on the verification issue is clearly not warranted.").

⁴ See 47 C.F.R. § 1.429(b); see also 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, 12 FCC Rcd 5188, at n.84 (1997) ("The standard for reconsideration of a Commission Order is that reconsideration is appropriate 'where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.'")

proceeding has been concluded. Section 1.420(d) of the Commission's Rules clearly states that with regard to proceedings for amendment of the FM Table of Allotments, "[c]ounterproposals shall be advanced in initial comments *only*..." 47 C.F.R. § 1.420(d) (emphasis added). Far from filing this most recent counterproposal in its comments, or even its reply comments, Fort Bend's Petition attempts to submit a counterproposal after the Commission has concluded its rule making proceeding and affirmed that decision. As such, the Commission must dismiss Fort Bend's Petition.

Based on a lengthy proceeding, the Commission reached a decision as to which of the various proposals involved in the rule making best serves the public interest. In reaching its decision, the Commission considered and rejected Fort Bend's first counterproposal. Thereafter, at Fort Bend's request, the Commission reassessed its initial decision and affirmed the conclusion it had reached, as well as confirming the rejection of Fort Bend's counterproposal. Fort Bend's blithe assertion that "[b]ecause comment on this channel substitution, as well as the changes at Ludington and Walhalla, has already been solicited, no purpose would be served by instituting another proceeding" is simply false. Fort Bend's new counterproposal constitutes an entirely new rule making proceeding with different engineering issues and different considerations. Fort Bend's attempt to gloss over the procedural defects of its request while suggesting that the Commission can simply rely on facts submitted two years ago in the context of a different rule making so that it can initiate a change to the FM Table of Allotments without the benefit of public comment is erroneous, and should not be countenanced by the Commission.

CONCLUSION

Though ostensibly seeking reconsideration of the Commission's earlier *Initial Order*, Fort Bend's Petition for Partial Reconsideration is simply another attempt to offer a counterproposal in the above-referenced proceeding. Fort Bend's repetitious Petition provides no basis in fact or law for reconsideration of the Commission's earlier action. Accordingly, the Commission should dismiss the Petition and affirm its actions in the *MO&O*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rhea Lytle, a secretary in the law firm of Shaw Pittman LLP, do hereby certify that true copies of the foregoing **“Opposition to Petition for Partial Reconsideration”** were sent via U.S. Mail this 28th day of July, 2003, to the following:

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